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COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA, BUTTE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ATLANTIC RICHFIELD COMPANY,

Defendants.

No. CV-89-039-BU-SEH

**CONSENT DECREE FOR
SETTLEMENT OF REMAINING
SITES PAST RESPONSE COSTS**

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I. BACKGROUND

The United States' Complaint

A. In 1989, the United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter (the "Complaint") pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, ("CERCLA"), 42 U.S.C. § 9607, against the Atlantic Richfield Company ("AR").

B. In the Complaint, which was subsequently amended on October 14, 1992, and October 31, 1994, the United States sought recovery of past response costs and declaratory judgment of liability for future response costs paid at or in connection with the Original Portion of the Silver Bow Creek/Butte Area National Priorities List ("NPL") Site, the Milltown Reservoir Sediments NPL Site (now referred to as the "Milltown Reservoir/Clark Fork River NPL Site"), and the Anaconda Smelter NPL Site. Although the scope of the Silver Bow Creek/Butte Area NPL Site was enlarged to include areas in and around Butte, Montana, the Complaint was not amended to include these areas.

C. In response to the United States' Complaint, AR asserted several defenses and filed counterclaims against the United States, seeking cost recovery, contribution, contractual indemnity, equitable indemnification, recoupment, and declaratory relief.

Settlement Framework

D. In November of 1998, the United States and AR reached a settlement regarding the claims of the United States at a portion of the Silver Bow Creek / Butte Area NPL Site -- the Streamside Tailings Operable Unit. The Streamside Tailings consent decree, together with a consent decree entered in the case of *Montana v. Atlantic Richfield*, No. CV-83-317-H-SEH, both of which were entered on April 19, 1999, also resolved most of the natural resource damages claims of the United States and the State of Montana (the "State"), and all of the natural resource damages claims of the Confederated Salish and Kootenai Tribes (the "Tribes") against AR. The Streamside Tailings consent decree also established a framework for resolving the United States' remaining claims throughout the Clark Fork River Basin in Montana. Under Section VII of the Streamside Tailings decree, the parties agreed to resolve the remaining areas in six groups or "baskets" of operable units:

1. Rocker Site;
2. Butte Mine Flooding (Berkeley Pit) Site and the Butte Active Mining Area Site;
3. Anaconda Smelter Site;
4. Clark Fork River Operable Unit, Warm Spring Ponds Operable Units, and the Milltown Reservoir Operable Units;
5. Butte Priority Soils (towns of Butte and Walkerville) Site; and
6. The Westside Soils Site formerly referred to as Non Priority Soils Operable Unit in paragraph 31(F) of the Streamside Tailings consent decree (rural Butte).

The United States and AR have already successfully concluded their negotiations for the Rocker and Butte Mine Flooding sites. The Rocker Site consent decree was entered in November of 2000, and the Butte Mine Flooding Site consent decree was entered in August of 2002.

The Streamside Tailings consent decree describes the baskets of operable units to be negotiated in the order described above, but it also provides the parties with flexibility to change this order. Consistent with this flexible framework, the parties commenced negotiations to next address:

1. The United States' claims against AR for certain past response costs paid by the United States relating to the Remaining Sites, as defined below, through July 31, 2002, for EPA costs and through October 7, 2002, for DOJ costs; and

2. Most of the defenses that have been or could be asserted by AR in response to the United States' claims for response costs or injunctive relief at the Remaining Sites, and counterclaims that have been or could be asserted by AR at the Remaining Sites.

E. This Consent Decree addresses certain past response costs and related covenants and reservations for the Remaining Sites. The response costs arise out of the following facts:

1. Butte, Montana has been the site of nearly continuous mining and milling activities from the 1860s to the present. Smelting activities also occurred in Butte from the 1870s to the early 1920s. Significant milling and smelting activity occurred in and around Anaconda, Montana from the early 1880s until the New Works

Smelter was closed in 1980. Wastes from these operations, containing hazardous substances, have been released into the environment.

2. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA listed the original Silver Bow Creek Site, on the National Priorities List (NPL) of Superfund Sites by publication in the Federal Register on September 8, 1983, 48 Fed. Reg. 40658. As originally listed, the Silver Bow Creek Site began at the headwaters of Silver Bow Creek and was characterized as being 28 stream miles long and included the Warm Springs Ponds complex. The original Silver Bow Creek Site was amended to include large areas in and around Butte on July 22, 1987, 52 Fed. Reg. 27627, and is now known as the Silver Bow Creek / Butte Area Superfund Site. In February of 1990, the Clark Fork River portion of the Silver Bow Creek / Butte Area Superfund Site was administratively transferred to the Milltown Reservoir Superfund Site. The Milltown Reservoir Superfund Site (now known as the Milltown / Clark Fork River Superfund Site) and the Anaconda Smelter Superfund Site were placed on the NPL by publication in the Federal Register on September 8, 1983. These sites, together with the Montana Pole and Treating Plant NPL site, are known collectively as the Clark Fork Basin NPL Sites.

3. In response to the release or threatened release of hazardous substances at or from these Clark Fork Basin Sites, significant response activities have occurred and are occurring to address hazardous substances at the Clark Fork NPL Sites.

4. The United States is filing with this Consent Decree an amended complaint to add claims against AR for reimbursement of past response costs which pertain to the Butte Priority Soils Operable Unit of the Silver Bow Creek / Butte Area NPL Site in and around Butte, Montana.

Notice

F. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified DEQ in January of 2002 of negotiations with AR regarding the settlement of EPA's and DOJ's past response costs, and provided DEQ, on behalf of the State, with an opportunity to participate in such negotiations and to be a party to this Consent Decree. DEQ has declined to participate in these negotiations, and is not a signatory to this Consent Decree.

G. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the Department of the Interior ("DOI"), the State, and the Tribes in February of 2002 of negotiations with AR regarding the settlement of EPA's and DOJ's past response costs, and provided these entities with an opportunity to participate in such negotiations and to be a party to this Consent Decree. These parties have declined to participate in these negotiations, and are not signatories to this Consent Decree.

H. By entering into this Consent Decree, AR and the United States, do not admit any liability arising out of the transactions or occurrences either that were alleged, or could have been alleged, in the complaint, amended complaints or counterclaims filed in this action.

I. The United States and AR agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated in good faith, that this Consent Decree will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, in the public interest, and consistent with the goals of CERCLA.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. Sections 1331 and 1345, and 42 U.S.C. Sections 9607 and 9613(b). This Court also has personal jurisdiction over the Parties. Solely for the purposes of this Consent Decree and the underlying complaints, the Parties waive all objections and defenses that they may have to jurisdiction of this Court or to venue in this District. AR and the Settling Federal Agencies shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States, and upon AR, as defined below, and its successors and assigns. Any change in ownership or corporate or other legal status, including but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of AR under this Consent Decree.

IV. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree, the following definitions shall apply:

a. "Anaconda Smelter Site" shall mean the area surrounding and including Anaconda, Montana where hazardous substances, pollutants, or contaminants from the Old Works and New Works facilities and associated operations and facilities have come to be located.

b. "AR" shall mean the Defendant, Atlantic Richfield Company, its divisions and subsidiaries, including ARCO Environmental Remediation L.L.C. (AERL), and any predecessors in interest. It shall also mean any successors in interest to the extent that any such successor's liability for Federal Milltown Past Response Costs and Remaining Sites Past Response Costs derives from the liability of the Atlantic Richfield Company, its divisions and subsidiaries, including AERL, and any predecessors in interest.

c. "Butte Priority Soils Site" shall mean that area described as the Butte Priority Soils Operable Unit in the response decision document for the Butte Active Mine Area Operable Unit and attached maps signed by EPA and DEQ on March 28 and April 2, 2001, respectively, including all related removal actions, and the Granite Mountain Historical District described in Appendix E-4 of the Butte Priority Soils Operable Unit Feasibility Study submitted to EPA on April 24, 2004.

d. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.

e. "Clark Fork River Basin" shall mean the main stem of the Clark Fork River to the Idaho border and all areas within Montana that naturally drain into the Clark Fork River or its tributaries.

f. "Clark Fork River Operable Unit" shall mean the site described in the Record of Decision for the Clark Fork River Operable Unit issued by EPA and dated April 2004.

g. "Consent Decree" shall mean this Consent Decree, and the appendix (AR's Answer in the Federal Action) attached hereto.

h. "Cost Documentation" shall mean a cost package for EPA's costs which consists of applicable: (1) payroll information, consisting of the SCORPIO\$ report or an equivalent cost summary, and any time sheets that exist, if requested by AR; (2) indirect cost information, consisting of an overall and an employee-by-employee SCORPIO\$ report or equivalent cost summary; (3) travel information, consisting of a SCORPIO\$ report or an equivalent cost summary, travel authorizations, and travel vouchers or their equivalent that exist; (4) EPA contractor (including Contract Laboratory Program contracts) information, consisting of site and/or Operable Unit (as this term is defined below) specific vouchers, any existing progress reports, Treasury schedules, tasking documents for contractors not required to provide progress reports, Annual Allocation Reports and the SCORPIO\$ report or an

equivalent cost summary; (5) EPA Interagency Agreements ("IAGs") information, consisting of SCORPIO\$ reports or an equivalent cost summary, IAGs and any amendments thereto, invoices or the equivalent, proof of payment documents, and any existing progress reports or their equivalent; (6) EPA Cooperative Agreements information, consisting of SCORPIO\$ reports or an equivalent cost summary, cooperative agreements and any amendments thereto, drawdown documentation, State quarterly progress reports; (7) prejudgment interest information, consisting of an interest cost report showing methodologies and calculations; and (8) Operable Unit allocated cost information, consisting of a narrative of allocation methodologies and spreadsheets implementing such methodologies. Because the State has incurred costs and may continue to incur costs under cooperative agreements with EPA, which relate to or are allocated to the Remaining Sites, Cost Documentation for these expenditures, if requested by AR, shall include (a) State contractor invoices, (b) any existing contractor progress reports, and (c) form 661 SBAS information (if not included in the State quarterly progress reports) or its equivalent; EPA may also provide the information described in the foregoing list of ACost Documentation@ in the form of printouts from electronic databases or systems that have been or may be developed by EPA in the future. "Cost Documentation" for response costs incurred by the Department of Justice shall consist of a cost summary of (a) direct labor costs, (b) other direct costs (invoices, travel, etc.), and (c) indirect costs, and upon request by AR, shall also consist of the supporting reports for each of these three types of DOJ costs.

i. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

j. "DEQ" shall mean the Montana Department of Environmental Quality and any predecessor or successor departments or agencies of the State.

k. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of that Department.

l. "Effective Date" shall mean the date on which this Consent Decree becomes effective pursuant to Section XV of this Consent Decree.

m. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of that Agency.

n. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. Section 9507.

o. "Federal Action" shall mean United States v. Atlantic Richfield Company, No. CV-89-039-SEH (D. Mont.).

p. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42

U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

q. "NPL" shall mean the National Priorities List set forth at 40 C.F.R. Part 300, Appendix B.

r. "Operable Unit" shall mean an area, geographic or otherwise, for which there is a response action, whether removal or remedial, that is subject to a separate administrative record and response selection decision.

s. "Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper or lower case letter.

t. "Parties" shall mean the United States and AR

u. "Remaining Sites" shall mean the following areas left to be settled in the Clark Fork River Basin under the April 19, 1999, Streamside Tailings Consent Decree settlement framework, namely the Anaconda Smelter Site, the Warm Spring Ponds Operable Units including the Mill Willow Bypass; the Clark Fork River Operable Unit, and the Butte Priority Soils Site. For purposes of this Consent Decree only, the "Remaining Sites" shall not include the Westside Site (rural Butte) (formerly known as the Non-Priority Soils Operable Unit), the Butte Active Mining Area Operable Unit or the Milltown Site, as defined by this Consent Decree. The "Remaining Sites" shall also exclude the following sites within the Clark Fork River Basin, all of which were addressed under prior Consent Decrees filed with this Court: (a) the Montana Pole NPL Site, (b) the Streamside Tailings Operable Unit of the Silver Bow Creek / Butte Area NPL Site, (c) the Rocker Timber Framing and Treating

Operable Unit of the Silver Bow Creek / Butte Area NPL Site, and (d) the Mine Flooding Operable Unit of the Silver Bow Creek / Butte Area NPL Site.

v. "Remaining Sites Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that EPA paid at or in connection with the Remaining Sites through July 31, 2002, including, without limitation, oversight costs, allocable Clark Fork general and site-wide costs, Interest on all such costs which has accrued pursuant to 42 U.S.C. § 9607(a) through such date, and all costs incurred by the United States Department of Justice in litigating this action through October 7, 2002. "Remaining Sites Past Response Costs," however, shall exclude the past and future response costs incurred at or in connection with the Grant-Kohrs Ranch National Historic Site including the bed and banks of the Clark Fork River to the extent owned, if at all, by the United States, and on or within lands administered by the Bureau of Land Management along or near the Clark Fork River at the 15 tracts specifically described in the report referenced in Paragraph 78(d) of the SSTOU Consent Decree by DOI or any of its agencies or bureaus including, without limitation, the National Park Service and Bureau of Land Management.

w. "Section" shall mean a portion of this Consent Decree identified by a roman numeral.

x. "Settling Defendant" shall mean AR.

y. "Settling Federal Agencies" shall mean the Department of Justice, the Department of the Interior (the Bureau of Mines, the Bureau of Land Management, the United States Geological Survey), the United States Department of

Treasury, the United States Department of Commerce, the United States Department of Agriculture, the United States Department of Agriculture Forest Service, the General Service Administration, the National Aeronautics and Space Administration, the United States Department of Defense, the Environmental Protection Agency, the United States Department of Health and Human Services, the United States Public Health Service, the Atomic Energy Commission, the Defense Minerals Exploration Administration, the Defense Minerals Administration, the Office of Minerals Exploration, and the Defense Minerals Procurement Agencies, and any predecessor and successor departments, agencies, bureaus, or services.

z. "United States" shall mean the United States of America, including all of its departments, agencies and instrumentalities.

aa. "Warm Springs Ponds Operable Units" shall mean the active area, inactive area, and Mill-Willow Bypass areas addressed in EPA Records of Decision dated September 27, 1990, and June 30, 1992, and associated Explanation of Significant Differences and errata sheets.

V. OBJECTIVES OF THE PARTIES

4. The objectives of the Parties in entering into this Consent Decree are:

a. to resolve the claims of the United States against AR for all Remaining Sites Past Response Costs;

b. to resolve certain defenses that AR has or could have asserted against the United States with respect to the Remaining Sites, as described in Paragraph 19 of this Consent Decree (AR's Waiver of Defenses Against the Claims of

the United States Regarding the Remaining Sites), subject to the reservations of rights described in Paragraph 20 of this Consent Decree (AR's Reservation of Rights Regarding the Remaining Sites); and

c. to resolve the claims that AR has asserted, or that AR could assert, against the United States with respect to the Remaining Sites, as described in Paragraph 18 of this Consent Decree (AR's Covenant Not to Sue the United States Regarding the Remaining Sites), subject to the reservations of rights described in Paragraph 20 of this Consent Decree (AR's Reservation of Rights Regarding the Remaining Sites).

VI. REIMBURSEMENT OF RESPONSE COSTS

5. The Clark Fork River Basin Remaining Sites Special Account. EPA has established a special account within the EPA Hazardous Substance Superfund called the Clark Fork River Basin Remaining Sites Special Account (also known as the Clark Fork River Basin Special Account). The amounts paid by AR to the United States under Paragraph 6 (AR's Reimbursement of Remaining Sites Past Response Costs), and the amounts paid by the Settling Federal Agencies to EPA under Paragraph 8 (Settling Federal Agencies' Payment of Response Costs for the Remaining Sites) shall be deposited in the Clark Fork River Basin Remaining Sites Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with any of the sites within the Clark Fork River Basin or to be transferred by EPA to the EPA Hazardous Substance Superfund.

6. AR's Payment of Remaining Sites Past Response Costs. AR agrees to pay a total of \$50,000,000, plus Interest on \$44,700,000 from July 31, 2002 until the date of payment, in the manner described below.

a. Within 20 days after the Effective Date of this Consent Decree, AR shall pay \$30,000,000 to the Clark Fork River Basin Remaining Sites Special Account of the EPA Hazardous Substance Superfund for Remaining Sites Past Response Costs.

b. By January 31, 2005 AR shall pay the balance of \$20,000,000 to the Clark Fork River Basin Remaining Sites Special Account of the EPA Hazardous Substance Superfund for Remaining Sites Past Response Costs; provided, however, that if the due date for the payment of \$30,000,000 under Paragraph 6(a) falls in 2005, AR shall pay the balance of \$20,000,000 to the Clark Fork River Basin Remaining Sites Special Account of the EPA Hazardous Substance Superfund for Remaining Sites Past Response Costs by January 31, 2006.

c. EPA shall submit to AR a bill for Interest on the sum of \$44,700,000 from July 31, 2002 through the date of lodging of this Consent Decree within 60 days after lodging of this Consent Decree. Within 30 days after the Effective Date of this Consent Decree, AR shall pay such Interest to the Clark Fork River Basin Remaining Sites Special Account of the EPA Hazardous Substance Superfund for Remaining Sites Past Response Costs, in the same manner and subject to the same terms described in Paragraph 6 of this Consent Decree.

d. The payments made under this Paragraph shall be made either by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the appropriate U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 89V0279, the EPA Region and Site/Spill ID # 08-99, and DOJ case number 90-11-2-430, or by certified or cashier's checks made payable to the United States referencing U.S.A.O. file number 89V0279, the EPA Region and Site/Spill ID # 08-99, and DOJ case number 90-11-2-430. Payment shall be made in accordance with instructions provided to AR by the Financial Litigation Unit of the United States Attorney's Office for the District of Montana following lodging of this Consent Decree. Any payments received by DOJ after 4:00 P.M. (Eastern Time) will be credited on the next business day. AR shall send notice that such payment has been made to the United States as specified in Section XI (Notices and Submissions) and to Cost Recovery Coordinator, US EPA Montana Office, 10 West 15th Street, Suite 3200, Helena, Montana 59624 and to Director of Financial Management Programs, US EPA Region 8, 999 18th Street, Denver, Colorado 80202.

7. Interest on Late Payments. In the event that any payment required by Paragraph 6 (AR's Reimbursement of Remaining Sites Past Response Costs) or Section VII, Paragraph 10 (Stipulated Penalties) is not received when due, then AR shall pay Interest on the unpaid balance from the Effective Date of this Consent Decree through the date that such payment is made. AR's payment of Interest under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of AR's failure to make timely payments under this Paragraph. AR shall make

all payments required by this Paragraph in the manner described in Paragraph 6 of this Consent Decree.

8. Settling Federal Agencies' Payment of Response Costs for the Remaining Sites. As soon as reasonably practicable after the date of entry of this Consent Decree, the United States, on behalf of the Settling Federal Agencies, shall pay to EPA \$12,000,000 for reimbursement of EPA's Past Response Costs and Future Response Costs incurred by EPA at the Remaining Sites.

a. The total amount to be paid by the Settling Federal Agencies pursuant to this Paragraph shall be deposited in the Clark Fork River Basin Remaining Sites Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with any of the sites within the Clark Fork River Basin, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

b. If the payment to the EPA Hazardous Substances Superfund required by this Paragraph is not made as soon as reasonably practicable, the Director, Legal Enforcement Program, EPA Region 8, may raise any issues relating to payment to the appropriate Department of Justice Assistant Section Chief for the Environmental Defense Section.

c. In the event that payments required by this Paragraph are not made within 60 days of the date of entry of this Consent Decree, Interest on the unpaid balance shall be paid at the rate established pursuant to Section 107(a) of CERCLA, 42

U.S.C. § 9607(a), commencing on the date of entry of this Consent Decree and accruing through the date of the payment.

d. The Parties acknowledge that the payment obligations of the Settling Federal Agencies under this Consent Decree can only be paid from appropriated funds legally available for such purpose. Nothing in this Consent Decree shall be interpreted or construed as a commitment or requirement that any Settling Federal Agency obligate or pay funds in contravention of the Anti Deficiency Act, 31 U.S.C. Section 1341, or any other applicable provision of law.

9. Drawdown on AR's Reserve. Paragraph 35 of the Streamside Tailings Consent Decree, which was entered by this Court on April 19, 1999, established a \$15 million reserve ("AR's Reserve") as an incentive toward future settlements of past costs and work to be performed by AR under that consent decree's settlement framework. The Streamside Tailings Consent Decree also provided that, if the United States and AR reach a settlement and lodge a consent decree with respect to the Milltown Site, the Clark Fork River Operable Unit, and the Warm Springs Ponds Operable Units by the time frames set forth in that decree, AR may use \$7,500,000 of the funds from AR's Reserve to reimburse the United States. Because this Consent Decree resolves the United States' claims with respect to only a portion of these areas, AR may use only \$3,000,000 of the funds from AR's Reserve to reimburse the United States.

VII. STIPULATED PENALTIES

10.

a. If any amounts due to EPA from AR under this Consent Decree are not paid by the required date, AR shall pay to EPA as a stipulated penalty, in addition to the Interest required by Paragraph 7, the following amounts per violation per day that such payment is late:

| <u>Penalty Per Violation Per Day</u> | <u>Period of Noncompliance</u> |
|--------------------------------------|---|
| \$4,000 | 1 st through 14 th day |
| \$5,500 | 15 th through 30 th day |
| \$7,500 | 31 st day and beyond |

b. All penalties accruing under this Section shall be due and payable to the United States within thirty (30) days of AR's receipt from EPA of a demand for payment of the stipulated penalties.

c. For all other violations of this Consent Decree, AR shall pay a stipulated penalty of \$1,000 per day per violation.

d. All payments to the United States under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," and shall be mailed to the following addresses:

Regular Mail: Mellon Bank, Attn: Superfund Accounting, Lockbox
360859, Pittsburgh, PA 15251-6859; or

Federal Express, Airborne, Etc.: Mellon Bank, 3 Mellon Bank Center,
Room #153-2713, Pittsburgh, PA 15259 REF: Lockbox 360859

e. Each such payment shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID # 08-22, the DOJ Case Number 90-11-2-430, and the name and address of the party making payment. Copies of check(s) paid pursuant to this Paragraph, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section XI (Notices and Submissions), and to Cost Recovery Coordinator, US EPA Montana Office, 10 West 15th Street, Suite 3200, Helena, Montana 59624 and to Director of Financial Management Programs, US EPA Region VIII, 999 18th Street, Denver, Colorado 80202.

f. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified AR of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day that a violation occurs, and shall continue to accrue through the final day of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

11. If the United States brings an action to enforce this Consent Decree, AR shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

12. Payments made under this Section shall be in addition to any other remedies or sanctions available to the United States by virtue of AR's failure to comply with the requirements of this Consent Decree.

13. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree.

VIII. COVENANTS AND RESERVATIONS BY THE UNITED STATES

14. United States' Covenant for Past Response Costs at the Remaining Sites for AR. In consideration of the payments that will be made by AR under the terms of this Consent Decree, and except as specifically provided in Paragraph 16 (United States' General Reservation of Rights as to AR), the United States covenants not to sue or to take administrative action against AR, and against AR's officers, directors and employees to the extent that the liability of such officers, directors and employees arises solely from their status as officers, directors and employees, for Remaining Sites Past Response Costs under Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607, 9613. This covenant not to sue is conditioned upon the satisfactory performance by AR of its obligations under this Consent Decree. This covenant not to sue shall take effect upon the United States' receipt of all payments made by AR under Paragraph 6 of this Consent Decree and extends only to AR and AR's officers, directors and employees, and does not extend to any other person.

15. Covenant for Settling Federal Agencies. In consideration of the payments that will be made by the Settling Federal Agencies under the terms of this Consent Decree, and except as specifically provided in Paragraph 17 (EPA's General Reservation of Rights as to Settling Federal Agencies) of this Section, EPA covenants not to take administrative action against the Settling Federal Agencies pursuant to

Sections 106 and 107(a) and 113(f) of CERCLA and Sections 3004(u) and (v), 3008, and 7003 of RCRA relating to the Remaining Sites. These covenants for the Remaining Sites shall take effect upon the receipt by EPA of the payments required by Paragraph 8 of Section VI (Settling Federal Agencies' Payment of Response Costs for the Remaining Sites). These covenants are conditioned upon the satisfactory performance by Settling Federal Agencies of their obligations under this Consent Decree. These covenants extend only to the Settling Federal Agencies and do not extend to any other person.

16. United States' General Reservations of Rights as to AR. The covenant set forth in Paragraph 14 (United States' Covenant for Past Response Costs at the Remaining Sites for AR), do not pertain to any matters other than those expressly specified in that Paragraph. The United States reserves, and this Consent Decree is without prejudice to, all rights against AR with respect to all other matters, including but not limited to, the following:

- a. claims to enforce this Consent Decree based on a failure by AR or the Settling Federal Agencies to meet a requirement of this Consent Decree;
- b. claims for response costs incurred or to be incurred by the United States that are not within the definition of Remaining Sites Past Response Costs and that have not been previously settled in Consent Decrees entered by this Court;
- c. claims for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. Section 9606;
- d. claims for criminal liability; and

e. claims for all response costs and Natural Resource Damages reserved by the United States against AR in Paragraph 78 (d) of the Consent Decree entered in this action for the Streamside Tailings Operable Unit.

17. EPA's General Reservation of Rights as to Settling Federal Agencies.

The covenants set forth in Paragraph 15 (Covenants for Settling Federal Agencies) do not pertain to any matters other than those expressly specified in that Paragraph. EPA reserves, and this Consent Decree is without prejudice to, all rights against Settling Federal Agencies with respect to all other matters, including but not limited to, the following:

- a. claims to enforce this Consent Decree based on a failure by the Settling Federal Agencies to meet a requirement of this Consent Decree;
- b. claims for criminal liability;
- c. claims against the Settling Federal Agencies for response costs and response actions at the Butte Priority Soils Site if the total future response costs (costs paid by EPA after July 31, 2002) and response costs incurred by AR after September 30, 2004 pursuant to the upcoming BPSOU Record of Decision) exceed \$90,000,000; provided, however, that these claims may be asserted only with respect to that portion of the total response costs exceeding \$90,000,000; and
- d. claims against the Settling Federal Agencies for response costs and response actions at the Remaining Sites if EPA seeks to compel response actions or recover costs incurred by the United States, either of which are for response actions at one or more of the Remaining Sites which are (i) outside the scope of the

Records of Decision for these areas to meet Performance Standards, or (ii) for claims or actions based on conditions or information previously unknown to EPA as of the date of lodging of this Consent Decree.

IX. COVENANTS AND RESERVATIONS BY AR AND THE SETTLING
FEDERAL AGENCIES

18. AR's Covenant Not to Sue the United States Regarding the Remaining Sites. Subject to the reservations in Paragraph 20, below, AR hereby covenants not to sue and agrees not to assert any past, present, or future claims or causes of action against the United States, its agencies, instrumentalities, officials, employees, agents, and contractors relating to the Remaining Sites, as defined herein, including:

a. any direct or indirect claim related to the Remaining Sites for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law; or

b. any claims under CERCLA Sections 107 or 113, 42 U.S.C. Sections 9607 and 9613, under RCRA Sections 3004(u) and (v), 3008 and 7002, or under CECRA, including Sections 711, 715, 719, 722, and 724, MCA 75-10-711, 75-10-715, 75-10-719, 75-10-722, 75-10-724, and any other theory of recovery or provision of law related to the Remaining Sites; or

c. any claims arising out of response actions at the Remaining Sites, including claims based on EPA's selection of response actions, implementation of response actions, oversight of response actions, or approval of plans for such activities.

AR also agrees not to assert any direct or indirect claim with respect to the Remaining

Sites for reimbursement from the State Environmental Quality Protection Fund and the State Orphan Share Account.

19. AR's Waiver of Defenses Against the Claims of the United States

Regarding the Remaining Sites. Except for the defenses expressly reserved in Paragraph 20 (AR's Reservation of Rights Regarding the Remaining Sites), below, AR hereby waives all of its defenses to the claims that have been or may be raised by the United States against AR in the Federal Action for response costs at any and all of the Remaining Sites, including AR's defenses to the United States' claims under CERCLA Sections 107 or 113, 42 U.S.C. Sections 9607 and 9613, under RCRA Sections 3004(u) and (v), 3008 and 7002, or any other theory of recovery or provision of law related to the Remaining Sites.

20. AR's Reservation of Rights Regarding the Remaining Sites. As to the Remaining Sites, AR reserves, and this Consent Decree is without prejudice to:

a. defenses, contribution and other claims and counterclaims that may be raised by AR in the Federal Action against the United States for response costs and response actions at the Butte Priority Soils Site if the total future response costs (costs paid by EPA after July 31, 2002 and response costs incurred by AR after September 30, 2004 pursuant to the upcoming BPSOU Record of Decision) exceed \$90,000,000; provided, however, that these defenses, contribution and other claims and counterclaims may be asserted only with respect to that portion of the total response costs exceeding \$90,000,000;

b. defenses, contribution and other claims and counterclaims raised by AR in the Federal Action against the United States for response costs and response actions at the Remaining Sites if the United States seeks to compel response actions by AR or recover costs incurred by the United States, either of which are for response actions at one or more of the Remaining Sites which are (i) outside the scope of the original Records of Decision and any Explanations of Significant Differences for these areas that exist on the date that this Consent Decree is signed by AR, or in the case of the Anaconda Regional Water, Waste and Soils Operable Unit ("ARWW&S OU"), are outside the scope of any first amendment of the September 19, 1998 ARWW&S OU Record of Decision, or (ii) for claims or actions based on conditions or information previously unknown to EPA; provided, however, that these defenses, contribution and other claims and counterclaims may be asserted only with respect to that portion of the response costs that is due to response actions at the Remaining Sites which are (i) outside the scope of the original Records of Decision and any Explanations of Significant Differences for these areas that exist on the date that this Consent Decree is signed by AR, or in the case of the ARWW&S OU are outside the scope of any first amendment of the September 19, 1998 ARWW&S OU Record of Decision, or (ii) based on conditions or information previously unknown to EPA as of the date of lodging of this Consent Decree;

c. defenses, contribution and other claims and counterclaims against the United States for response costs, response actions and Natural Resource

Damages sought by the United States pursuant to the reservation of rights contained in Paragraph 78(d) of the Streamside Tailings Consent Decree; and

d. with respect to any claims by the United States for future response costs and response actions at the Remaining Sites, AR reserves the following defenses and claims for declaratory relief to adjudicate those defenses, based on:

(i) allegations that EPA's decisions regarding the selection or implementation of any response action are arbitrary and capricious or are otherwise not in accordance with law; (ii) allegations that EPA failed to incur response costs in a manner not inconsistent with the NCP; (iii) allegations that EPA failed to provide adequate Cost Documentation, as defined herein; (iv) allegations of accounting errors; and (v) any defense set forth in affirmative defenses numbered 16, 19, 21, and 24 of AR's Answer in the Federal Action. (A copy of affirmative defenses 16, 19, 21 and 24 is attached hereto as Exhibit A for reference).

21. Settling Federal Agencies' Covenant Not to Sue for Reimbursement.

Settling Federal Agencies hereby agree not to assert any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Service Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113, or any other provision of law with respect to the Remaining Sites, or to assert any direct or indirect claim with respect to the Remaining Sites for reimbursement from the State Environmental Quality Protection Fund and the State Orphan Share Account. This covenant does not preclude demand for reimbursement from the Hazardous Substance Superfund of costs incurred by a Settling

Federal Agency in the performance of its duties (other than pursuant to this Consent Decree) as a lead or support agency under the National Contingency Plan (40 C.F.R. Part 300).

22. No Preauthorization of Claims. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700.

X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

23. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Remaining Sites against any person not a Party hereto.

24. The Parties agree, and by entering this Consent Decree this Court finds, that AR and the United States are entitled, as of the Effective Date of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2) for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are (a) the Remaining Sites Past Response Costs and (b) for contribution protection to the United States only, all other response costs incurred by any entity at the Remaining Sites, and all additional response actions taken or to be taken at these sites, except to the extent that such claims are reserved by EPA and by AR pursuant to Paragraph 17 (EPA's General Reservation

of Rights as to Settling Federal Agencies) and Paragraph 20 (AR's Reservation of Rights Regarding the Remaining Sites). The contribution protection set forth in this Paragraph is intended to provide the broadest protection afforded by CERCLA for the matters addressed in this Consent Decree.

25. AR agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify EPA and DOJ in writing no later than 60 days prior to the initiation of such suit or claim. AR also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify EPA and DOJ in writing within 10 days of service of the complaint or claim upon it. In addition, AR shall notify EPA and DOJ within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

26. Waiver of Claim-Splitting Defenses. a. In any subsequent administrative or judicial proceeding initiated by the United States (a) for injunctive relief, recovery of response costs, or other relief relating to any of the Remaining Sites, or (b) for other claims reserved in Paragraph 16 (United States' General Reservations of Rights as to AR), AR shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the

Covenant Not to Sue by the United States set forth in Section VIII (Covenants and Reservations by the United States).

b. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating any of the Remaining Sites, the United States shall not use any provision of this Consent Decree to assert and maintain any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims or defenses raised by AR in the subsequent proceeding were or should have been brought or raised in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section IX (Covenants and Reservations by AR and the Settling Federal Agencies) and the waiver of defenses set forth in Paragraph 19 (AR's Waiver of Defenses Against the Claims of the United States Regarding the Remaining Sites).

XI. NOTICES AND SUBMISSIONS

27. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, DOJ, and AR, respectively.

As to the United States:

As to DOJ:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ #90-11-2-430

As to the Settling Federal Agencies:

Chief, Environmental Defense Section
United States Department of Justice
P.O. Box 23986
Washington, DC 20026-3986

As to EPA:

Director, Montana Office
U.S. Environmental Protection Agency
Region 8 Montana Office
10 West 15th Street, Suite 3200
Helena, Montana 59624

D. Henry Elsen, Attorney
U.S. Environmental Protection Agency
Region 8 Montana Office
10 West 15th Street, Suite 3200
Helena, Montana 59624

As to AR:

Robin Bullock
Project Coordinator
Atlantic Richfield Company
317 Anaconda Road
Butte, MT 59701

Jean A. Martin
Atlantic Richfield Company
6 Centerpointe Drive, Room 557
La Palma, CA 90623

XII. RETENTION OF JURISDICTION

28. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XIII. INTEGRATION

29. This Consent Decree constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

XIV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

30. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment, in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. Section 9622(d) and 28 C.F.R. Section 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. AR consents to the entry of this Consent Decree without further notice.

31. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and

the terms of the agreement may not be used as evidence in any litigation between the Parties.

XV. EFFECTIVE DATE

32. The Effective Date of this Consent Decree shall be the date it is entered by the Court.

XVI. SIGNATORIES/SERVICE

33. The undersigned representatives of AR, the Environment and Natural Resources Division of the United States Department of Justice, and the United States Environmental Protection Agency, each certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

34. AR shall identify, on the attached signature page, the name, address, and telephone number of an agent who is authorized to accept service of process by mail on behalf of AR with respect to all matters arising under or relating to this Consent Decree. AR hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons. Although AR has already filed an answer to the complaints previously filed in this action, the Parties agree that AR need not file an answer to the amended complaint filed with this Consent Decree unless or until the Court expressly declines to enter this Consent Decree.

35. AR hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified AR in writing that it no longer supports entry of the Consent Decree.

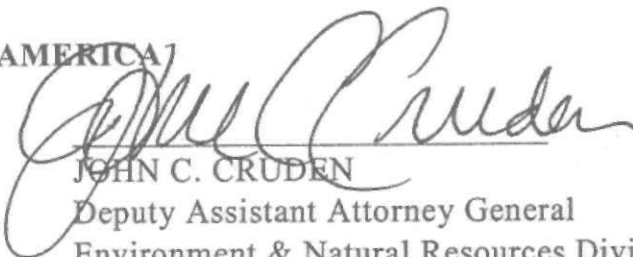
36. Rule 54(b) Final Judgment. Upon the Court's approval of the Consent Decree, the Decree shall be entered as a final judgment under Fed. R. Civ. P. 54(b). The Court expressly determines that there is no just reason for delay in entering this judgment.

SO ORDERED THIS _____ DAY OF _____, 2004.

United States District Judge

FOR THE UNITED STATES OF AMERICA

Date: _____



JOHN C. CRUDEN
Deputy Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Date: 10/12/04



MATTHEW W. MORRISON
Senior Counsel
Environmental Enforcement Section
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611

Date: _____

MICHAEL J. ZEVENBERGEN
Senior Counsel
Environmental Defense Section
Environment & Natural Resources Division
U.S. Department of Justice
c/o NOAA Damage Assessment
7600 Sand Point Way, NE
Seattle, Washington 98115

Date: _____



KRIS MCLEAN
Assistant United States Attorney
District of Montana
105 East Pine, 2nd Floor
Missoula, Montana 59802

FOR THE UNITED STATES OF AMERICA

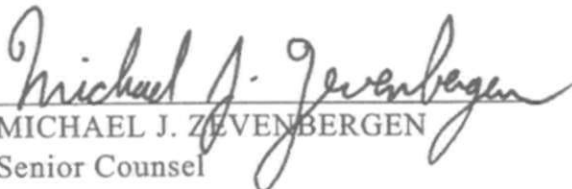
Date: _____

JOHN C. CRUDEN
Deputy Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Date: _____

MATTHEW W. MORRISON
Senior Counsel
Environmental Enforcement Section
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611

Date: Oct. 13, 2004



MICHAEL J. ZEVENBERGEN
Senior Counsel
Environmental Defense Section
Environment & Natural Resources Division
U.S. Department of Justice
c/o NOAA Damage Assessment
7600 Sand Point Way, NE
Seattle, Washington 98115

Date: _____

KRIS MCLEAN
Assistant United States Attorney
District of Montana
105 East Pine, 2nd Floor
Missoula, Montana 59802

Date: 9/20/04

John F. Wardell, Acting
for JOHN F. WARDELL
Region VIII Montana Office Director
U.S. Environmental Protection Agency
10 West 15th Street, Suite 3200
Helena, MT 59626-0096

Date: 9/23/04

Carol Rushin
for CAROL RUSHIN
Assistant Regional Administrator
Office of Enforcement, Compliance, and
Environmental Justice
U.S. Environmental Protection Agency,
Region VIII
999 18th Street
Denver, Colorado 80202

Date: 9/20/04

D. Henry Elsen
D. HENRY ELSSEN, Attorney
Legal Enforcement Program
U.S. Environmental Protection Agency
Region VIII Montana Office
10 West 15th Street, Suite 3200
Helena, MT 59624

FOR THE ATLANTIC RICHFIELD COMPANY:

Date: _____


STEPHEN A. ELBERT
28100 Torch Parkway
Warrenville, IL 60555

Date: _____


STEPHEN H. FOSTER
Holland & Hart LLP
P.O. Box 639
401 North 31st Street, Suite 1500
Billings, Montana 59711

Approved as to Form and Content: ,

Date: _____


JEAN A. MARTIN
Atlantic Richfield Company
6 Centerpointe Drive, Room 557
LaPalma, CA 90623

EXHIBIT A

Stephen H. Foster
James M. Ragain
Kyle A. Gray
HOLLAND & HART LLP
401 North 31st Street, Suite 1500
P. O. Box 639
Billings, Montana 59103-0639

William W. Maywhort
HOLLAND & HART LLP
8350 E. Crescent Parkway, Suite 200
Englewood, CO 8011
(303) 290-1600

R. Kirk Mueller
ATLANTIC RICHFIELD COMPANY
555 17th Street, Room 1600
Denver, Colorado 80202
(303) 293-4246

ATTORNEYS FOR DEFENDANT AND COUNTERCLAIM PLAINTIFF
ATLANTIC RICHFIELD COMPANY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA, BUTTE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

ATLANTIC RICHFIELD COMPANY,
and
CLEVELAND WRECKING COMPANY, INC.
Defendants.

No. CV 89-39-BU-PGH

ANSWER OF DEFENDANT
ATLANTIC RICHFIELD COMPANY
AND SECOND AMENDED
COUNTERCLAIMS

ATLANTIC RICHFIELD COMPANY,
Defendant and
Counterclaim Plaintiff,

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT

OF JUSTICE;
JANET RENO, in her official
capacity as the Presiding
Officer of the United States
Department of Justice;
UNITED STATES DEPARTMENT
OF THE INTERIOR;
BRUCE BABBITT, in his official
capacity as the Secretary of
the United States Department
of the Interior;
UNITED STATES BUREAU OF MINES;
RHEA GRAHAM,
in her official
capacity as Director of the
United States Bureau of
Mines;
UNITED STATES BUREAU OF LAND
MANAGEMENT;
MIKE DOMBECK (acting),
in his official
capacity as Director of
the United States Bureau of
Land Management;
UNITED STATES GEOLOGICAL SURVEY;
GORDON P. EATON,
in his official
capacity as Director of the
United States Geological
Survey;
UNITED STATES DEPARTMENT OF
THE TREASURY;
ROBERT E. RUBIN,
in his official
capacity as Secretary of the
United States Department of
the Treasury;
UNITED STATES DEPARTMENT
OF COMMERCE;
MICKEY KANTOR (acting)
in his official
capacity as Secretary of
the United States Department of
Commerce;
UNITED STATES DEPARTMENT OF
AGRICULTURE;
DAN GLICKMAN,
in his official
capacity as Secretary of
the United States Department
of Agriculture;
UNITED STATES FOREST SERVICE;

JACK THOMAS,
in his official
capacity as Chief of the
United States Forest Service;
GENERAL SERVICES ADMINISTRATION;
ROGER W. JOHNSON,
in his official
capacity as Administrator
of the General Services
Administration;
NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION;
DANIEL S. GOLDIN, in his offi-
cial capacity as Administrator
of the National Aeronautics
and Space Administration;
UNITED STATES DEPARTMENT OF
DEFENSE;
WILLIAM PERRY,
in his official
capacity as Secretary of the
United States Department of
Defense;
ENVIRONMENTAL PROTECTION AGENCY;
CAROL M. BROWNER, in her official
capacity as Administrator of
the Environmental Protection
Agency;
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES;
DONNA E. SHALALA, in her official
capacity as Secretary of
Health and Human Services;
UNITED STATES PUBLIC HEALTH
SERVICE;
AUDREY F. MANLEY
(acting), in her
official capacity as Surgeon
General of the United States;
HAZEL O'LEARY, in her official
capacity as Secretary of the
Department of Energy;
ATOMIC ENERGY COMMISSION,
DEFENSE MINERALS ADMINISTRATION,
DEFENSE MINERALS EXPLORATION AD-
MINISTRATION, OFFICE OF MINERALS
EXPLORATION, DEFENSE MINERALS
PROCUREMENT AGENCY,

Counterclaim Defendants.

~~"response costs" as that term is used in CERCLA and therefore~~
denies the remainder of the allegations in paragraph 23.

24. Paragraph 24 is an excerpt from Section 107 of CERCLA, which speaks for itself. No response from ARCO is required.

25. Denies.

26. Denies.

27. Denies.

28. Contains no allegations against ARCO and therefore requires no response from ARCO.

29. Contains no allegations against ARCO and therefore requires no response from ARCO.

30. Contains no allegations against ARCO and therefore requires no response from ARCO.

31. ARCO denies all allegations not specifically admitted or denied.

II. DEFENSES

FIRST (AFFIRMATIVE) DEFENSE

The Amended Complaint and the Claim for Relief fail to state a claim upon which relief can be granted.

SECOND (AFFIRMATIVE) DEFENSE

Plaintiff's claim for Relief is barred by the due process clause of the Fifth Amendment to the United States Constitution.

THIRD (AFFIRMATIVE) DEFENSE

WITHDRAWN

FOURTH (AFFIRMATIVE) DEFENSE

Plaintiff's Claim for Relief is barred because CERCLA, as implemented, constitutes selective enforcement in violation of the Fifth Amendment to the United States Constitution.

FIFTH (AFFIRMATIVE) DEFENSE

Plaintiff's Claim is barred because Section 107 of CERCLA, 42 U.S.C. § 9607, as applied in the circumstances of this action, constitutes an ex post facto law and an excessive fine contravening Article I, Section 9, Clause 3 of, and the Eighth Amendment to, the United States Constitution.

SIXTH (AFFIRMATIVE) DEFENSE

Plaintiff's Claim for Relief is barred by the taking clause of the Fifth Amendment to the United States Constitution.

SEVENTH (AFFIRMATIVE) DEFENSE

The Plaintiff's Claim for Relief is barred to the extent the release or threat of release claimed was caused solely by an act of God as provided for in Section 107(b)(1) of CERCLA, 42 U.S.C. § 9607(b)(1).

EIGHTH (AFFIRMATIVE) DEFENSE

Plaintiff's Claim for Relief is barred in whole or in part under Section 107(b)(2) of CERCLA, 42 U.S.C. § 9607(b)(2) to the extent the release or threat of release was caused solely by an act of war.

NINTH (AFFIRMATIVE) DEFENSE

Plaintiff's Claim for Relief is barred, in whole or in part, by the act or omission of a third party, as provided for in Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

TENTH (AFFIRMATIVE) DEFENSE

Plaintiff's Claim for Relief is barred as provided for in Section 107(b)(4) of CERCLA, 42 U.S.C. § 9607(b)(4).

ELEVENTH (AFFIRMATIVE) DEFENSE

The Plaintiff is barred from bringing this action by the doctrine of "unclean hands" in that the United States has, for over 120 years, aided, abetted, encouraged, authorized, facilitated, fostered, supported, and participated in the metals mining industry, including the hazardous substances disposal alleged in the Amended Complaint.

TWELFTH (AFFIRMATIVE) DEFENSE

The Plaintiff is estopped from bringing this action because (1) Plaintiff, acting through its various agencies, branches, departments, and other offices, has aided, abetted, encouraged, authorized, facilitated, fostered, supported, participated in and regulated all facets of the operations within the sites at issue and has realized economic and other benefits from such operations, and (2) Defendant ARCO and previous owners and operators at the sites have reasonably relied to their detriment upon the Plaintiff's acts and representations regarding its operations. Plaintiff therefore is estopped from bringing this action.

THIRTEENTH (AFFIRMATIVE) DEFENSE

Plaintiff's Claim for Relief is barred by the doctrines of assumption of the risk, acquiescence, ratification, and waiver, because Plaintiff, acting through its various agencies, branches, departments, and other offices, has aided, abetted, encouraged, authorized, facilitated, fostered, supported, participated in and regulated all facets of the operations within the sites at issue, with full knowledge for over 100 years of the waste disposal necessarily attendant to such operations.

FOURTEENTH (AFFIRMATIVE) DEFENSE

The Plaintiff's Claim for Relief is barred, in whole or in part, because the Plaintiff has failed to mitigate its damages in that much of the removal and remedial action for which Plaintiff allegedly incurred costs was unnecessary or was performed improperly, unlawfully, without authorization, or in a non-cost-effective manner by Plaintiff and/or its contractors.

FIFTEENTH (AFFIRMATIVE) DEFENSE

The Plaintiff has released ARCO and the previous owners and operators at the Sites from liability resulting from, arising out of, or connected in any way with certain milling, smelting or other operations located within the geographic areas which are the subject of this action.

SIXTEENTH (AFFIRMATIVE) DEFENSE

Plaintiff's Claim for Relief is barred to the extent any alleged releases of hazardous substances from the alleged sites

at issue were or are a "federally permitted release" as that term is defined in Section 101(10) of CERCLA, 42 U.S.C. § 9601(10).

SEVENTEENTH (AFFIRMATIVE) DEFENSE

Plaintiff's Claim for Relief is barred, in whole or in part, to the extent that Plaintiff has covenanted not to sue ARCO for certain costs it seeks in this action as provided in Administrative Orders on Consent executed by the parties and Consent Decrees relating to the sites at issue.

EIGHTEENTH (AFFIRMATIVE) DEFENSE

Plaintiff's Claim for Relief is barred in whole or in part by the applicable statute of limitations.

NINETEENTH (AFFIRMATIVE) DEFENSE

Plaintiff's Claim for Relief is barred to the extent that some or all of the alleged releases or threatened releases are or were of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes from a location where it is naturally found.

TWENTIETH (AFFIRMATIVE) DEFENSE

Plaintiff's Claim for Relief is barred in whole or in part because the definition of "hazardous substance" contained in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), does not include certain mining wastes the regulation of which has been suspended by act of Congress under the Bevill Amendment. See 42 U.S.C. § 9601(14) (c).

TWENTY-FIRST (AFFIRMATIVE) DEFENSE

Plaintiff's Claim for Relief is barred, in whole or in part, because (1) the alleged release or threatened release does not exceed applicable or relevant and appropriate requirements (ARARs) so as to cause the incurrence of response costs, and (2) any hazardous substances found within the materials deposited at the sites are not likely to disassociate themselves from those materials under circumstances that are reasonably likely to exist at the sites.

TWENTY-SECOND (AFFIRMATIVE) DEFENSE

Plaintiff cannot recover response costs incurred before the enactment of CERCLA or before the listing of the relevant sites on the National Priorities List (NPL).

TWENTY-THIRD (AFFIRMATIVE) DEFENSE

WITHDRAWN

TWENTY-FOURTH (AFFIRMATIVE) DEFENSE

Certain of the costs sought by Plaintiff are not necessary, reasonable, cost-effective and consistent with CERCLA and the NCP, and Plaintiff therefore may not recover such costs from ARCO.

TWENTY-FIFTH (AFFIRMATIVE) DEFENSE

To the extent that Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), requires the Court to award Plaintiff a declaratory judgment even if the Court, in its discretion, would not otherwise do so, Section 113(g)(2) of CERCLA is an unconstitutional violation of the separation of powers.

TWENTY-SIXTH (AFFIRMATIVE) DEFENSE

Upon information and belief, Plaintiff's Claim for Relief is barred, in whole or in part, by Plaintiff's failure to comply with the requirements of Section 104 of CERCLA, 42 U.S.C. § 9604, including but not limited to Plaintiff's failure to enter into a cooperative agreement with the State of Montana prior to incurring costs as required by Section 104(c), Plaintiff's failure to observe the statutory dollar and time limitations on response actions found in Section 104(c)(1), and Plaintiff's failure to obtain adequate assurances from the State of Montana pursuant to Section 104(c)(9).

III. COUNTERCLAIM

Without waiving any of its responses or defenses to the United States' Amended Complaint and Claim for Relief, Counterclaim Plaintiff Atlantic Richfield Company (ARCO), for its Counterclaims against Counterclaim Defendants, alleges as follows:

A. BACKGROUND

1. The United States ("U.S.") seeks in its Amended Complaint in this action a judgment that ARCO is liable for costs of response under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607, with respect to the Milltown Reservoir Sediments Site, the Anaconda Smelter Site and the Silver Bow Creek portion of the ~~Silver Bow Creek/Butte Area Site.~~